

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH ROBINSON,

Petitioner,

Civil No. 05-321-ST

vs.

ORDER

CHARLES DANIELS, Warden,

Respondent.

REDDEN, Judge:

Magistrate Judge Stewart filed her findings and recommendation on October 13, 2005, recommending that respondent's motion to dismiss be denied. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Rule 72(b) of the Federal Rules of Civil Procedure. When a party objects to any portion of a magistrate judge's findings and recommendation regarding the disposition of any motion excepted in subsection (b)(1)(A), the district court must make a de novo determination of the specified proposed findings or recommendation to which objection is made. 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Respondent has timely filed objections. I have, therefore, given the file of this case a de novo review. I agree with Judge Stewart's conclusion that respondent's motion to dismiss should be denied.

Respondent sought an order from Judge Stewart dismissing petitioner's habeas corpus petition, arguing that the court lacked subject matter jurisdiction because 28 U.S.C. § 2241 is not the proper procedural mechanism through which to challenge the legality of petitioner's incarceration. Respondent argues the proper procedural mechanism is 28 U.S.C. § 2255, and petitioner is foreclosed from relying on that statute because of the successive petition rule.

I agree with Judge Stewart's conclusion that petitioner alleged facts in his complaint that are sufficient to confer subject matter jurisdiction on this court. He has alleged facts to support his contention that 28 U.S.C. § 2255 is ineffective to test the legality of his detention and that § 2241 will allow him an unobstructed procedural shot at presenting his newly discovered evidence in support of his claim of innocence.

Therefore, I ADOPT the Magistrate Judge's findings and recommendation (doc. 17) that respondent's motion to dismiss (doc. 13) should be denied.

IT IS SO ORDERED.

Dated this 7th day of December, 2005.

/S/ James A. Redden
James A. Redden
United States District Judge